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SUBCOMMITTEE ON FEDERALISM AND THE CENSUS

Oversight Hearing

Hearing Topic: *"The Connecticut Experience: What Can Be Done to Spur
Brownfield Redevelopment in the New England Corridor?"*

1:00 p.m., Monday, March 13, 2006

Bridgeport City Hall
City Council Chambers
45 Lyon Terrace
Bridgeport, Connecticut

BRIEFING MEMORANDUM

Summary

There are approximately 450,000 to 1 million brownfield sites across the nation. These sites are often located in urban areas and sit on valuable pieces of property that, if redeveloped, would spur community economic development with new jobs, shopping and living options, and new transportation and infrastructure development.

In 2002, the Environmental Protection Agency's (EPA) Brownfields Program was established as an independent program with dedicated appropriations to fund redevelopment of these contaminated sites. While the program presents impressive

numbers of sites redeveloped, more can be done to address this widespread challenge.

The purpose of this field hearing is to determine what progress has been made in the State of Connecticut under the EPA program and what can be done to spur redevelopment within the State, thereby reducing community blight, safeguarding the local environment, and spurring economic revitalization of the communities in which these properties exist.

Definition

By federal definition, brownfields are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”¹ According to the Government Accountability Office (GAO), there are an estimated 450,000 to one million abandoned or underutilized brownfields sites across the nation.² Often these areas are located in urban areas and, but for the presence of hazardous substances, are valuable pieces of property. It is thought that a disproportionate number of brownfield sites exist in states where heavy manufacturing once dominated the landscape, such as Connecticut.

Brownfields range in size from an abandoned gas station to an abandoned factory. Despite prime location, developers often choose “greenfields” or green space for development projects because of fears of liability under Superfund and the significant additional cost to redevelop brownfields, leaving brownfields untouched, worsening community blight and resulting in depressed property values and decreased tax revenues. Redevelopment of these sites not only reduces urban sprawl and preserves open green space; it also often has a domino effect on the surrounding community and economy. For every acre of brownfields redeveloped, 4.5 acres of green space is saved.³ For every dollar federal, state, and local governments spend on brownfields programs, communities see a return of almost \$2.50 in private investment.⁴ Further, with the new business and living

¹ CERCLA § 101(39).

² Government Accountability Office, *Brownfield Redevelopment*, Report No. GAO-05-94, at 1 (2004).

³ Office of Brownfields Cleanup and Redevelopment (OBCR), *EPA’s Brownfields Program*, at 5 (March 2005).

⁴ Id.

spaces of redeveloped brownfields comes numerous jobs - during the cleanup, development, and post-development phases – as well as improved or new infrastructure and transportation options.

Connecticut Brownfield Programs

Leading cleanup and redevelopment efforts are the state voluntary response programs. There are programs in 49 states, 2 territories, and the District of Columbia. The State of Connecticut offers a number of brownfield redevelopment incentive and assistance programs through various agencies. These programs include, but are not limited to, the following:

Connecticut Department of Environmental Protection

Connecticut's voluntary remediation program (VRP) began operating in 1995 and is administered by the Remediation Division of the Bureau of Waste Management at the Connecticut Department of Environmental Protection (CT DEP). Under the VRP, owners or developers may remediate a site pursuant to state regulation and then enter a Covenant Not to Sue with the CT DEP. According to the CT DEP, more than 7,000 sites have undergone or are currently undergoing remediation under the state's VRP.

Covenant Not to Sue

With certain eligible parties, the CT DEP will enter a Covenant Not to Sue. The covenant protects the contracting party from state-required remediation of a contaminated site and prevents any action against the holder of the covenant for contamination that occurred prior to the date of the agreement. CT DEP will enter a Covenant Not to Sue with parties including a prospective purchaser of, a current owner of, or a lending institution with a security interest in contaminated property. Responsible parties may not be a party to a Covenant Not to Sue. Eligible parties must verify that they are not responsible for site contamination nor are they affiliated with the party responsible for contamination. Further, parties must certify that they will redevelop the property and return the site to productive use, if not continuing a current productive use, and that the site has been or will be remediated.

Urban Sites Remedial Action Program

The Urban Sites Remedial Action Program (USRAP) was designed to ease the conveyance and reuse of contaminated properties by addressing the future liability fears of prospective purchasers and investors. The program was first adopted on a pilot basis in 1992 and then made permanent in 1993. The program created \$30.5 million in bond funds to address contamination through grants to site owners or in funds for direct site assessments and remediation actions when the responsible party is unwilling or unable to undertake the work themselves. Where the responsible party is available and willing to undertake remediation action in concert with the CT DEP, the program provides a “fast track” for review and approval of those remediation plans. Eligible sites must be located in a distressed community or in a target investment community and possess high economic development potential.

According to CT DEP, 44 sites have undergone or are currently undergoing remedial action pursuant to USRAP. The remediation of the vast majority of these sites is funded by the responsible parties. Remediation at only 11 of those sites is underwritten by the state itself through USRAP. The Lafayette Boulevard project in Bridgeport, Connecticut is one of the 11 state-funded projects.⁵ The projects undertaken by Lacey Manufacturing and Westinghouse/Bryant in Bridgeport, Connecticut are two of the remaining 33 projects enrolled in the program and funded by responsible parties.

Environmental Land Use Restrictions

Parties may enter an Environmental Land Use Restriction (ELUR), which is recorded on the municipal land records and binds a property owner to a particular land use restriction. An ELUR allows varying levels of remediation of contaminated properties according to the future use of the land and, concomitantly, the risk of exposure associated with that land use. An ELUR is binding not only on the current owner who enters the agreement with the CT DEP, but it is also binding on future owners and occupants unless the Commissioner of the CT DEP issues a release.

⁵ The site of a former Sears Automotive Center was remediated and redeveloped into State Police barracks. The state program provided \$360,000 in remediation funding.

Property Transfer Program

The CT DEP created a Property Transfer Program for the conveyance of certain “establishments.” “Establishments” are statutorily defined and include properties on which certain activities were conducted or at which certain levels of hazardous waste were generated, recycled, stored, treated, transported, or disposed. The Property Transfer Program requires the disclosure of environmental conditions. Parties to the conveyance use the program’s forms to report current contamination and, where appropriate, agree to conduct remediation or post-remediation monitoring.

Connecticut Brownfields Redevelopment Authority

In 1999, the state created the Connecticut Brownfields Redevelopment Authority (CBRA), a subsidiary of the quasi-public agency of the Connecticut Development Authority. Through the CBRA and with the cooperation of the municipal government in which a project is located, owners and developers may apply for grants of up to \$10 million for brownfield redevelopment projects. Grant dollars are generated by the future incremental municipal property taxes that will be generated once a site is remediated and returned to productive use. As taxes are generated, a pre-determined percentage of those taxes is turned over to the CBRA for future grants to other projects.

The CBRA maintains a database of more than 200 brownfield properties that are eligible for assistance under the Grants for Brownfield Redevelopment program. Additional sites may be eligible if their economic value is negatively impacted by contamination. Sites may be located anywhere in the state and grant dollars may be used on any direct remediation or redevelopment cost.

The CBRA also offers grants for Phase I and Phase II site assessments. Municipalities, owners, or developers may apply for grants up to \$3,000 for Phase I site assessments and up to \$10,000 for Phase II site assessments.

In addition to the Grants for Brownfield Redevelopment program, CBRA coordinates all state, Federal, and municipal brownfield redevelopment programs. CBRA serves the state as a “one-stop Brownfields Center.”

Department of Economic and Community Development

The Department of Economic and Community Development (DECD) administers a number of financial incentive programs for brownfield redevelopment. Qualified parties may obtain financial assistance for a range of expenses from site assessment to remediation and development.

The DECD administers the CT Brownfield Revolving Loan Fund (CBRLF), which offers low-interest loans for the remediation of non-residential properties for owners or developers that can provide a 20 percent matching initial investment toward remediation.

Through the Dry Cleaning Establishment Remediation Fund, owners or operators of dry cleaning businesses can obtain grants for the remediation, containment, or mitigation or pollution resulting from business operation. Businesses must cover the initial \$20,000 project cost and then may receive up to \$300,000 in program funds in one calendar year, for a total of \$300,000 per project.

DECD also administers the Special Contaminated Property Remediation and Insurance Fund (SCPRIF) in concert with the CT DEP. Individuals, corporations, or municipalities may apply for 5-year, below-market interest rate SCPRIF loans. Parties may expend funds on a range of assessment, demolition, and remediation activities. Borrowers pay interest only during the term of the loan and repay the loan principal at the end of the loan term, upon completion of remediation, or when the property is sold or leased.

Through the Industrial Site Investment Tax Credit Program, the DECD offers up to \$100 million in business tax credits for amounts invested in certain remediation and redevelopment projects. Eligible businesses may claim a credit for 100 percent of their qualified investments over a 10-year period. Investments must be made in projects which will return environmentally contaminated properties to economically viable condition. Both investments made directly through the taxpayer (a minimum of \$5 million) or indirectly through an investment fund (the fund must be worth a minimum of \$60 million aggregately) are eligible under the tax credit program. Tax credits are transferable to another taxpayer and credits may be carried forward for 5 years for those years in which businesses are unable to claim a credit.

In addition to the tax credit on project investment, the real property of certain industrial and urban redevelopment projects may be eligible for a 50 percent abatement on the portion of property taxes that is attributable to the increased property value resulting from remediation. The abatement will not carry with the sale or transfer of the real property without the consent of the municipality in which the property lies.

Federal Brownfield Program

Legislative Background

EPA first addressed Brownfields administratively in 1995 under the Superfund Program created by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁶ The purpose of the brownfields program was to address sites contaminated by hazardous waste but which did not pose a serious enough threat to public health or to the environment to qualify for Superfund assistance under CERCLA. Beginning in 1997, Congress recognized the program with earmarked funding within the Superfund appropriation. The Superfund program was established for the cleanup of the nation's worst hazardous waste sites.⁷ According to EPA, by 2000 92 percent of the sites listed on the National Priorities List (NPL) were either undergoing cleanup or removed from the NPL because cleanup was complete or were removed for other reasons. The focus of the hazardous waste debate thus turned to less seriously contaminated sites, i.e., brownfields.

In 2001, Congress passed the Brownfields Revitalization and Environmental Restoration Act of 2001 (Brownfields Act).^{8,9} The Brownfields Act established a formal program administered within EPA with an annual authorization through FY 2006 of \$250 million in grant funds. The Act provides for (1) assessment grants to characterize, assess, and conduct planning at brownfields sites, and (2) a remediation grant program using revolving loan funds. Of the \$250 million

⁶ P.L. 96-510.

⁷ Congressional Research Service, *Brownfields and Superfund Issues in the 108th Congress*, Order Code IB10114, at i (2005).

⁸ Title II of P.L. 107-118, the Small Business Liability Relief and Brownfields Revitalization Act.

⁹ Congress passed H.R. 2869 on December 20, 2001 and the President signed the law on January 11, 2002.

authorized for the program overall, \$200 million is authorized for these activities. Of that \$200 million, \$50 million (or 25 percent of the appropriation if less than \$200 million) is authorized for the assessment and cleanup of low risk sites contaminated by petroleum products. The Act also provides funding for technical assistance, training, and research. Of the \$250 million authorization, the remaining \$50 million authorizes assistance to states in establishing or enhancing their voluntary cleanup programs.

The Brownfields Act also addresses liability issues, which are of preeminent concern for owners and developers of brownfields. Under CERCLA, generators of hazardous substances, transporters who selected the disposal site, and past and present owners of a brownfield site can all be held liable. Superfund liability for cleanup and related costs may also extend to parties who may not have been responsible for the activities that caused the site contamination, such as insurers or banks that made loans to the operator or owner of a brownfield site. CERCLA also allows these “potentially responsible parties” (PRPs) to sue other parties for contribution to the cleanup costs, which may result in hundreds of parties being subject to Superfund liability. This vast scheme of liability was an enormous disincentive to purchase, cleanup, and redevelop brownfields. The Brownfields Act addresses this impediment by limiting liability for owners in certain situations. Specifically, liability is limited for owners of land that is contaminated by adjoining property as well as for prospective purchasers of known contaminated property. Further, the Act clarifies the CERCLA “innocent landowner” defense by requiring the EPA to issue regulations defining the “all appropriate inquiry” required for a purchaser to be considered an innocent landowner.^{10,11} Finally, the Act forbids the federal government from intervening at sites being cleaned up under a state program except where (1) the state requests assistance, (2) the contamination has or will migrate across state lines or onto federally owned or controlled property, (3) the EPA determines that a release or threatened release may present an imminent and substantial endangerment to the public health or welfare or the environment, or (4) the EPA, after consulting with the state, determines that newly discovered information, not previously known by the state, requires further remediation to protect public health or welfare or the environment.

¹⁰ CERCLA creates a defense against liability for a landowner who unknowingly purchased contaminated land so long as the purchaser made “all appropriate inquiry” prior to the transaction.

¹¹ Final regulations expected by year-end 2005.

While authorized at \$250 million per year from FY 2002 through FY 2006, the brownfields program has yet to reach that level of appropriations. The FY 2005 appropriation was \$165 million. In FY 2004, the program was appropriated \$171 million. In his FY 2006 budget request, the President allotted \$210 million to the brownfields program.

US EPA Brownfields Program

Through its brownfields program, EPA seeks to change its role from “regulatory hammer” to an enabler of economic development and environmental protection. The program currently has over 500 cities enrolled in the program, focusing on four main themes - to protect the environment, promote partnerships, strengthen the marketplace, and sustain reuse of redeveloped brownfields. More than 110 cities are enrolled in the EPA program in Region V alone, totaling more than \$45 million. Of those 110 cities, 37 are Ohio cities.¹²

Between its administrative inception 1993 and the passage of the Brownfields Act in late 2001, the program awarded 398 assessment grants, 151 grants to establish revolving loan funds to finance cleanups, and 47 job-training grants.¹³ In FY 2003-2004 alone, the first year in which the program received appropriations under the Brownfields Act, the brownfields program awarded 456 assessment, cleanup, and revolving loan fund grants.¹⁴ Overall, the brownfields program has touched 50 states and 40 Tribes. The program has leveraged \$6.6 billion for cleanup and redevelopment costs, supported assessments at 6,000 properties, and leveraged more than 30,000 jobs.¹⁵

The EPA’s brownfields program does not exist alone. Focusing on the promotion of partnerships, the agency works with 23 other federal agencies of which redevelopment is part of their mission. Further, every state has a cleanup program. These programs are vital to cleanup efforts; 11,000 sites have already undergone cleanup efforts through these programs. The EPA has Memoranda of Understanding (MOU) with many of these federal and state partners as well as with private partners.

¹² US EPA announced the 2005 grantees on May 10, 2005, including 12 new Ohio cities.

¹³ Congressional Research Service, *The Brownfields Program Authorization: Cleanup of Contaminated Sites*, Order Code RL30972, at i (2002).

¹⁴ Office of Brownfields Cleanup and Redevelopment (OBCR), *EPA’s Brownfields Program*, at 5 (March 2005).

¹⁵ Id.

GAO Report GAO-05-94 “Brownfield Redevelopment”

At the request of the full committee Chairman Tom Davis and now subcommittee Chairman Mike Turner, the Government Accountability Office (GAO) reviewed the EPA’s brownfields program and the general state of brownfield redevelopment nationwide. GAO issued a report in December 2004. Specifically, the report focuses on (1) stakeholder views of the EPA’s contribution to brownfields cleanup and redevelopment, (2) EPA methodology of measuring program accomplishments, and (3) stakeholder views on how to improve or complement the EPA brownfields program.

During its investigation, GAO found that most stakeholders agree that although EPA funds are generally not directly involved in the redevelopment of brownfields, such funds are crucial because they support initial stage activities, such as site assessment and clean up, not generally supported by lenders or other government programs. Site assessment grants work as “seed money” for the identification of contamination while revolving loan fund grants fund the actual cleanup. Additionally, EPA funds often go to sites with more costly and complex cleanups, less desirable locations, or liability issues. Stakeholders also emphasized the vital role EPA funds play in establishing or expanding state voluntary cleanup programs.

With respect to performance measurement, GAO concluded that EPA’s current measures are inadequate. In general, the agency’s measures do not gauge progress toward the major goals of the program. For instance, EPA measures the cumulative number of sites assessed, jobs generated, and the amount of cleanup and redevelopment funds leveraged by the program. EPA does not, however, gather data on grantee cleanup and redevelopment activities. Further, while it is not one of the primary objectives of the brownfields program, assistance to state voluntary cleanup programs represents approximately one-third of the program’s fund expenditures but EPA does not collect or report data on such assistance provided. Finally, there are no effective measures to assess the extent to which the program reduces environmental risks.

With regard to improvement or complementing the brownfields program, GAO interviewed numerous stakeholders from site assessment grantees and revolving loan recipients to developers, attorneys, nonprofit organizations, and state and local government officials. From these interviews, GAO identified three major options to improve or complement EPA's program. First, stakeholders suggested the elimination of the limitation on grant eligibility. The current program limits grants to owners that purchased brownfields before January 2002. While the Consolidated Appropriations Act for Fiscal Year 2004 temporarily suspended this provision, stakeholders contend the clause continues to discourage redevelopment by limiting program eligibility. Second, stakeholders suggested changes to the administrative and technical requirements that prove to be impediments to obtaining and using of revolving loan funds. As of November 2004, grant recipients loaned out only 17 percent of the \$168 million in loan fund grants awarded by EPA. Stakeholders maintain that the technical requirements are the primary impediment to loaning out this money. In particular, stakeholders suggested EPA change the administrative and technical requirements to require priority be given those applicants with demonstrated administrative expertise or to coalitions of applicants that could consolidate administrative functions thereby reducing cost. Third and finally, stakeholders believed a tax credit for remediation costs would attract developers to brownfields sites and encourage the redevelopment of such land over the development of green space.

EPA agreed with the findings in a draft of GAO's report and responded positively to the suggestions therein. Regarding the findings on performance measures, EPA announced plans to continue collection and evaluation of environmental data received from brownfield grant recipients to develop an environmental performance measure. EPA also stated it would continue its work with states to develop measures for state response programs and to develop baseline information over the coming years to enable the agency to establish stronger environmental indicators. In response to the stakeholder suggestion to eliminate the disqualification of pre-January 2002 land purchasers from grant eligibility, EPA agreed to weigh the potential benefits and detriments to the brownfields program for such a revision. With regard to the suggestions for improving the revolving loan grant fund process, EPA stated it would continue its review of the revolving loan grant fund to ascertain the reasons for underutilization. EPA responded to the suggestion that grant applicants with proven administrative ability be given higher priority by stating that the ranking criteria for revolving loan fund grant recipients

were adjusted, giving more weight to ranking factors that demonstrate and applicant's ability to manage a revolving loan fund and make loans. EPA also stated it strengthened its evaluation of recipients' proposed business plans and now requires EPA regional offices to submit an advisory ranking score on an applicant's ability to manage grants. Furthermore, the EPA said it may award supplementary funds to successful grant recipients that have already made loans, thus providing additional incentive to grant recipients with demonstrated performance.

Tax Credit Proposal

In the 108th Congress, Chairman Turner introduced H.R. 4480, the "Brownfields Revitalization Act of 2004." The bill proposed a tax credit of up to 50 percent for qualified remediation expenses of brownfields sit in certain poverty-rated areas. Those remediation expenses qualified under the bill are the (1) the abatement or control of any hazardous substance, petroleum, or any petroleum by-product at a contaminated site in accordance with a State-approved remediation and redevelopment plan, (2) the complete demolition of a structure, (3) the removal and disposal of property, and (4) the reconstruction of utilities on a contaminated site.

Under H.R. 4480, states would allocate credit amounts under an allocation plan using specific criteria including poverty rates, location of a contaminated site, and the amount of new employment expected to result from redevelopment.

Chairman Turner expects to introduce legislation similar to H.R. 4480 during the first session of the 109th Congress, with two major differences. First, the expected legislation will clarify the liability relief for potential responsible parties. Such relief is limited only to the approved remediation plan. Liability for other types of claims (e.g. liability to adjacent property, outstanding health complaints, etc.) will be unaffected. Second, the legislation will clarify the roles of a state development agency and a state environmental agency. In general terms, the state development agency is responsible for administering the tax credit program and awarding the credits allowed under the new legislation while the state environmental agency is responsible for ensuring the proposed remediation plan meets appropriate standards.

Witnesses

Panel I

1. The Honorable John Fabrizi, Mayor, City of Bridgeport
2. Mary Sanderson, Chief, Remediation and Restoration II Branch, Office of Site Remediation & Restoration, U.S. Environmental Protection Agency Region I
3. Gina McCarthy, Commissioner, Connecticut Department of Environmental Protection
4. The Honorable Mark Lauretti, Mayor, City of Shelton

Panel II

1. Elizabeth Barton, Chair, Environmental & Land Use Department, Day, Berry & Howard, LLP
2. Joseph Carbone, President/CEO, The Workplace, Inc.
3. Robert Santy, President, Regional Growth Partnership
4. Stephen Soler, President, Georgetown Land Development Company
5. Barry Trilling, Partner, Wiggin and Dana LLP